# THE MICHIGAN JUDICATURE ACT OF 1915.

## IV. PLEADINGS.

The Judicature Act, re-enacting a long-standing statute of the State, makes it the duty of the Supreme Court to enact general rules of practice for the Circuit Courts with a view to the attainment of the following improvements:

"2. The abolishing of all fictions and unnecessary process and proceedings."

"3. The simplifying and abbreviating of the pleadings and proceedings."

"6. The remedying of such abuses and imperfections as may be found to exist in the practice."

"7. The abolishing of all unnecessary forms and technicalities in pleading and practice."[1]

But lest the Supreme Court should misconceive its duty in the premises, the Act went further and made two radical provisions respecting pleading, one providing a new test for the sufficiency of declarations[2] and the other abolishing demurrers and dilatory pleas.[3] The Supreme Court, however, took prompt measures to revise and reform the current rules of pleading, and a complete revision of the Circuit Court Rules, prepared and proposed by a Committee of the State Bar Association, was approved and adopted by the Court as a necessary supplement to the reforms made by the Judicature Act. So that in dealing with the Act it is quite essential to treat the new Rules as an integral part of it, and in the following discussion the Statute and Court Rules will be considered together.

### 1. THE DECLARATION.

By statute, while the old forms of declarations are permissible, it is declared that "no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend."[4]

Pleadings have always served a double function, namely, raising issues and giving notice, but the former has usually overshadowed the latter. It was never a valid objection to a pleading that it did not give sufficient notice, but it was always a fatal defect if it

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[1] Judicature Act, Ch. I, § 14.
[2] Ch. XIV, § 2.
[3] Ch. XIV, § 4.
[4] Chap. XIV, § 2.

failed to raise an issue. Of course if it raised an issue it usually gave enough notice, and yet the resort to bills of particulars shows how frequently this was not true. The two functions are really different. "Pleadings," says the Supreme Court of Delaware, "are designed not only to put in issue single points, but to apprise the parties of what they are to come prepared to try."[5]

This distinction between the notice-giving and the issue-raising functions of pleadings has been developed in a very interesting way in Michigan. When the defendant has wished to present an affirmative defense he has not pleaded in confession and avoidance as at common law or as is done under the Code, but he has pleaded the general issue and set up a notice of special defense under it. The notice does not raise an issue in the strict sense, but *merely* gives notice. Even when the trial of the case includes a trial of the matters involved in the general issue as well as of those involved in the notice, at least a portion of the trial is not based upon an issue at all. And when the defendant waives the benefit of the general issue and demands the right to open and close, the general issue substantially disappears and the entire trial goes forward without any issue at all on the pleadings.

This might be claimed to really involve only a statutory form of issue, on the theory that the allegations in the notice serve the same purpose as those in a plea of confession and avoidance, and the statute is merely to be taken as dispensing with a denial of them. Such statutory issues are common under the Codes. But this explanation is not sound, for the reason that the test of the sufficiency of the notice is not the same as that for a plea in confession and avoidance or an affirmative defense under the Code. Technical niceties of legal form have no place there, and allegations in the notice cannot be objected to on the ground that they are so far mere conclusions or matters of evidence that a denial of them would not raise an issue. The sole test of the sufficiency of the notice is its capacity to give information. "The accuracy required in special pleading has never been applied to a notice of special defense, and to so hold would defeat the very object in view in thus simplifying the rules of pleading. It is sufficient if such a notice fairly apprises the plaintiff of the defense that will be set up."[6]

For many years our practice has thus demonstrated the feasibility of basing litigation upon pleadings which are drawn solely to give notice. If this rule can be applied to defenses it can of course

[5] Reading's Heirs v. State (1833) 1 Harr. 216.

[6] Farmers' Mutual Fire Ins. Co. v. Crampton, (1880) 43 Mich. 421.

be applied to declarations, for the theory of allegations is identical for all the pleadings in the case. If defendants can be permitted to employ pleadings against which only the objection of surprise at the trial can be successfully made, there is no reason why plaintiffs cannot be allowed to do the same. The rule as to notices of special defenses has worked admirably, and no lawyer would favor its repeal. Then why not make it general, and apply it to the pleadings of both parties?

This is just what the Judicature Act has expressly done. "No declaration shall be deemed insufficient which shall contain such *information* as shall reasonably inform the defendant of the nature of the case he is called upon to defend." Such is the language of the Act. It is substantially the same language that has long been applied by our Court to notices of special defenses. Our practice has thus become symmetrical and uniform, and the function of all pleadings has become primarily that of giving notice. The purpose of pleading has ceased to be the exemplification of the subtilties of pleader's logic and has become the intelligible disclosure of the real nature of the respective claims of the parties.

If this sensible and reasonable test is to be substituted for the old test of the common law, the old forms of declaration ought to give place to others more in harmony with the new standard of sufficiency. The cumbersome, discursive, redundant and involved precedents which our local practice books have scrupulously preserved for professional use, and which conservative lawyers could hardly refuse to follow, ought to be supplanted by other more modern, direct and business-like forms which disclose on their face a greater regard for efficiency than for conventionality. These the New Circuit Court Rules have given us. For the first time the Supreme Court has officially approved a set of pleading forms, and has offered them to the profession as models to be followed They are substantially identical with the forms under which all the litigation of Great Britain has been conducted for more than forty years.[7]

In 1912, when New Jersey abandoned the Common Law System of pleading and adopted a new practice act better fitted to modern needs, a set of official pleading forms was made a part of the rules of court, and while fewer in number and less representative than those which our Supreme Court has adopted, they are, as far as they go, exactly the same kind of forms. In Connecticut the admirable

[7] See Bullen & Leake's Precedents of Pleadings (7th Ed. 1915) where hundreds of currently used English forms almost exactly conforming to the official Michigan forms, may be found.

system for many years in force has involved the use of official pleading forms issued and approved by the Courts. And in the recent report of the Board of Statutory Consolidation of New York, prepared by some of the ablest lawyers of that State, one of the defects in the present system was declared to be the want of official forms of pleading. Under the New Circuit Court Rules Michigan has patterned after the best thought and practice of the time in respect to its forms of pleadings.

The problem of inconsistent causes of action and defenses is expressly taken up in the New Rules, which declare that such "causes of action or defenses are not objectionable, and when the party is in doubt as to which of two or more statements of fact is true he may in separate counts or paragraphs allege or charge facts, although the same may be inconsistent with other counts or paragraphs in the same pleading."[8]

There are two possible ways of solving the problem of inconsistent causes of action or defenses. One is to allow alternative pleading of facts in the same count or defense, and the other is to allow the inconsistent facts to be set up positively in different counts or paragraphs. The method of using alternative allegations is the one most in accord with modern ideas of truthfulness in allegations. Inconsistent allegations do not look frank and honest on their face. People in their personal affairs who wish to tell the truth do not tell inconsistent stories, each with absolute positiveness. They say that the facts are *either* this way *or* that way. No other form of expression would meet the conscientious scruples of an honest man. Why, then, should not the pleader do the same? Why force him to take a position as a pleader that he would never think of taking as a man? The only reason by which such a course could be justified is that it is the historic method of the common law, and nobody is deceived by what a pleader says. It is not, however, in accord with modern ideas for a pleader to assert what he does not believe, and if the belief is in the alternative the allegations should be in the same form.

Alternative pleading has been authorized in some jurisdictions by statute.[9] In others it has been sanctioned by the courts without a statute.[10] The New Rules do not expressly authorize it, but there

[8] Circuit Court Rules, Rule 21, § 7.

[9] Kentucky:—See Brown v. Ill. Cent. R. R. Co., (1897) 100 Ky. 525. Missouri:—See Otrich v. St. Louis, I. M. & S. Ry. Co. (1911), 154 Mo. App. 420.

[10] Re Morgan (1887) 35 Ch. D. 492; Philips v. Philips (1898) 4 Q. B. D. 127; Bank v. Feaster (1910), 87 S. C. 95; Rasmussen v. McKnight (1883) 3 Utah 315; Hasberg v. Moses (1903) 81 N. Y. App. Div. 199.

is a seeming discrepancy on the point in the Rules. As originally prepared by the Committee of the Bar Association, Rule 21, Section 7, expressly authorized alternative pleading, but the Supreme Court changed it by substituting an authorization of inconsistent counts or defenses. But when we turn to the authorized pleading forms, it appears that the Supreme Court retained the alternative form of allegations as submitted by the Bar Association Committee. This alternative form is found in forms No. 1 and No. 31. It would thus appear that in so wording Rule 21, Section 7, as to authorize inconsistent counts and defenses, the Supreme Court did not intend to prohibit or discourage a resort to alternative allegations in proper cases, and for this reason it approved the forms appropriate to that kind of pleading. The conclusion seems necessary therefore that both methods are open to Michigan pleaders, and they may make their allegations in the alternative when in doubt as to which of two inconsistent facts is true, or they may set up each version of the facts in a separate count alleged positively.

### 2. JOINDER OF COUNTS.

The question of the right to join counts has always been befogged by historical considerations. Under the common law practice the courts took jurisdiction of cases under the authority conferred by the original writ, and this writ contained a summary of the case which the plaintiff was proposing to litigate. Obviously, since there could be but one writ in any case, no counts could be united in the same declaration which did not fall within the scope of the case made by the writ. Furthermore, the common law laid great stress upon singleness of issue, and hence it looked with distrust upon any joinder of counts which did not all permit of the same plea.

But under modern conditions in this country neither one of these objections to a free joinder of counts has any weight. The *sole test* of the right to join should be *convenience*. All procedure is but a means to an end. It seeks to produce in the most direct and effective way a determination of conflicting rights. Anything which makes for convenience is generally good; anything which results in inconvenience is generally bad.

The joinder of counts is, in principle, nothing but consolidation of actions. No joinder can take place which brings together counts triable only in different courts or in different jurisdictions. This is an absolute limitation. Further, a consolidation of actions or

joinder of counts is usually productive of no convenience when the different actions or counts affect different parties. But aside from these two restrictions it is very difficult to lay down any definite rule limiting joinder which will work successfully.

The New York Code of 1848, which has been followed in some twenty-eight other states, adopted the plan of classifying actions into about half a dozen classes, and then allowing only those to be joined which should all fall within some one class. These classes were arbitrary and were doubtless intended solely as an aid to convenience in judicial administration, but they have not proved a great success. Kansas, with its strong tendency to ignore conventionality, after operating for about forty years with this provision, abolished it a few years ago, and substituted a statute making no limitation whatever in the right to join causes of action except identity of parties.[11] And the recent Report of the Board of Statatory Consolidation of New York, in proposing an abandonment of the old joinder statute says:— "This method of prescribing the causes of action that may be joined has led to great confusion and to constructions almost without number. In Bliss's New York Annotated Code there are over eighteen pages of citations under Section 484 (the Joinder Statute)."

The Judicature Act has made a notable advance in our practice regarding joinder, without falling into the errors committed by the Codes. It provides in substance that the plaintiff may join in one action, either at law or in equity, as many causes of action as he may have against the defendant, but if it appear that any such causes of action cannot be conveniently disposed of together the Court may order separate trials.[12] This is substantially the rule in England,[13] and has been adopted, though in quite different language, in the New Jersey Practice Act of 1912.[14] It is also the rule adopted by the Supreme Court of the United States for equity cases,[15] and has been proposed as one of the new civil practice rules for New York.[16] It has therefore already undergone the test of long use in England and has commended itself strongly to American legislatures and courts.

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[11] Gen. St. 1909, § 5681.
[12] Chap. VIII, § 1.
[13] Order XVIII, Rule 1.
[14] N. J. Laws 1912, Chap. 231, § 14.
[15] U. S. Equity Rules, Rule 26.
[16] Report of Board of Statutory Consolidation, Rule 180.

### 3. DILATORY DEFENSES.

Demurrers, pleas in abatement and pleas to the jurisdiction are abolished. Instead of these is substituted a motion to dismiss, or proper allegations in the answer in equity, or a notice under the plea at law.

The abolition of these remedies is quite striking at first sight, but it does not make a very substantial change in the practice. The difference between a demurrer and a motion to dismiss is only in appearance. They serve the same purpose. Demurrers seem to have acquired a bad reputation of late, for they have been abolished in England[17] and in New Jersey,[18] and in the federal courts in equity.[19] The chief objection to them is that they produce delay, and a more summary method of raising points of law is desirable. Of course the delay could be avoided by merely allowing them to be set down for argument within a limited time after being filed. But a motion is a more flexible remedy than a demurrer, because it can not only be directed to the face of the opponent's pleading but may bring new facts into the record by affidavit. So that the change made in this regard, while not revolutionary, is doubtless good.

But a much more important feature of the new Act is the permission offered to raise points of law in the answer or notice under the plea. Matters in abatement at law have long been pleadable by way of notice under the general issue,[20] contrary to the orthodox theory of the common law that a plea in bar was a waiver of defenses in abatement. But we have never before gone to the point of permitting demurrers and pleas to the same matter to be filed at the same time. But under the new Act this is permissible, as it should be, for there was never any sound reason for the common law rule forbidding it. The English practice, in connection with the abolition of demurrers, provides for the raising of points of law in the same pleading in which issues of fact are presented, and the new New Jersey Act does the same. Some American States which have retained the demurrer have by statute offered litigants the same privilege,[21] which is of course a matter not at all dependent on the abolition of demurrers. By pleading all defenses at the same time, whether they consist of points of law or matters of fact, much time can be saved. This is the chief advantage to be gained.

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[17] Order 25.

[18] Laws 1912, Chap. 231, Rules § 26.

[19] U. S. Equity Rules, Rule 29.

[20] Old Circuit Court Rule (Law) 6.

[21] Utah: See State ex. rel. v. Edwards (1908) 33 Utah 243; California: See Hurley v. Ryan (1897) 119 Cal. 71.

4. THE GENERAL ISSUE AND NOTICES THEREUNDER.

The Judicature Act has not made any general change of first importance in the use of the general issue and notices of special defenses, but the New Rules have introduced a striking innovation, with the design of extending still further the underlying idea of notice as the main purpose of pleading.

One of the worst abuses of the common law system of pleading was the use of general issues under which all sorts of special defenses were admissible. The plaintiff came to court almost absolutely in the dark as to what he was to be called upon to meet. Our practice cured this evil to the extent of requiring notice of defenses which were in their nature affirmative. But this only met half the difficulty. It did not touch the further hardship imposed upon the plaintiff of being kept in ignorance of the nature of the negative defenses which the defendant would rely upon. The whole declaration was put in issue. It would be an unusual case where the defendant would really intend to controvert all the plaintiff's allegations, but the plaintiff was nevertheless required to assume that he might do so and to be prepared for attack anywhere along his whole line.

This use of an unspecified and unrestricted general denial, designed and employed largely for the purpose of throwing dust in the plaintiff's eyes, is parallel to the use of an unspecified general demurrer. In Michigan an enlightened conception of fair play, far in advance of that in most other American jurisdictions, has long condemned the use of a demurrer which did not specify in detail the points of attack contemplated by the demurrant.[22] But we never followed this up with a supplementary rule requiring the same specification of points of attack under a general issue. So that although the defendant might intend to really contest only one or possibly none of the plaintiff's allegations, the plaintiff was nevertheless obliged to carry the burden and expense of proving all the allegations of his declaration.

The New Rules have remedied this glaring defect. They provide that where the defendant really intends to take issue on only a part of the allegations in the plaintiff's declaration, he must point out that part, and when he does not intend to controvert any of the plaintiff's allegations he must say so.[23] The penalty for failure to observe these rules is the taxing against the defendant of the plaintiff's expenses incurred in proving or preparing to prove

[22] Old Circuit Court Rule (Law) 5, (a).
[23] Circuit Court Rule 23, § § 7 and 8.

those parts of his case which the defendant has misled him into believing were to be contested at the trial.

These rules will do much to convince the public that litigation is not a mere game of chance carried on by lawyers at the expense of their clients. They will, if enforced, limit the scope of the trial to the real points in controversy, and will save the public thousands of dollars in court expenses through the saving of time in the conduct of trials. Courts will be able to do more business, jurors and witnesses will be less seriously burdened, and the costs of preparing records for appeal will be materially reduced.

While the exact provisions of these rules are not found in the practice of any other jurisdiction, similar results are obtained in a somewhat different way to a limited extent in England and much more completely in New Jersey.

In England it is provided that "it shall not be sufficient for a defendant in his statement of defense to deny generally the grounds alleged by the statement of claim or for a plaintiff in his reply to deny generally the grounds alleged in a defense by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."[24] But there is no penalty for making specific denials of matters which the party does not really intend to controvert, so that this provision alone would not be sufficient to produce a real disclosure of a party's position. To supplement this another rule is found which provides that "any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on the other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the Court or a Judge certify that such refusal was reasonable."[25]

But the burden of obtaining a disclosure is under these rules thrown on the party not making the denials, instead of upon the party who makes them. It is the latter who ought always to tell what he really intends by them.

In New Jersey the practice is better, and approaches very near to that set forth in the New Michigan Rules. The court rules

[24] Order 19, Rule 17.
[25] Order 32, Rule 4.

attached to the New Practice Act in that state provide that "Allegations or denials, made without reasonable cause, and found untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the Court, as may have been necessarily incurred by the other party, by reason of such untrue pleading."[26] This, of course, goes somewhat farther than the Michigan Rules, for the same penalty is applied to a party who either alleges too much or denies too much. The foregoing provision is also supplemented by another which requires denials to be specific except when the defendant intends in good faith to controvert all the allegations, in which case they may be general.[27] And the New Jersey Act also contains a provision relative to express admissions almost exactly like that quoted above from the English Rules.[28] It is quite clear, therefore, that the practice is not novel, and has been in force in much the same form as we have it for three or four years in New Jersey, with nothing so far observable to throw doubt upon its entire success.

### 5. REMEDY FOR UNCERTAINTY IN PLEADING.

The Judicature Act gives no remedy for a defective pleading except a motion to dismiss or a plea or answer. But it is obvious that something corresponding to the common law special demurrer for uncertainty ought to be available to prevent the too frequent claim of surprise at the trial. This need has been met by the New Rules, which provide that "whenever a pleading, at law or in equity, is deemed to be indefinite, uncertain or incomplete, a further and better statement of the nature of the claim or defense or further and better particulars of any matter stated in any pleading may be ordered on motion, upon such terms as to costs and otherwise as may be just."[29]

This is designed to prevent parties from lying in wait for their adversaries at the trial in cases where the pleadings are obviously so uncertain as to give the other party insufficient notice. If adequacy of notice is to be the sole test of sufficiency, as the Judicature Act declares, then unless there is some means of objecting to the insufficiency prior to the trial there will be many miscarriages of justice. And if such means of objecting does exist, it will be fair and right for the court to hold that on the trial pleadings

[26] Laws 1912, Chap. 231, Appendix, § 19.
[27] Laws 1912, Chap. 231, Appendix, § 40.
[28] Laws 1912, Chap. 231, § 18.
[29] Rule 21, § 8.

shall be liberally construed from the point of view of notice, for failure to ask for a better notice may well be deemed a waiver of many defects.

The motion for a further or better statement is the remedy in use under the English practice,[30] and such a motion is in universal use under the Codes. Some question has arisen as to the precise relation between this remedy and that by demand for a bill of particulars. It would seem that they might well be deemed co-ordinate and concurrent remedies in many cases. In *Conover* v. *Knight*,[31] the Supreme Court of Wisconsin said upon this point:—"We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such distinction has no tangible existence in reason or law."[32] Clearly there are many cases where no demand of particulars under the old practice could successfully be made, but where the pleading is nevertheless defective as a notice. In such cases a remedy now exists by motion. If it is the defendant's notice of special defense which thus falls short of the prescribed standard, the remedy is one unknown to our former practice in any form, for it has always been the rule that an objection to evidence was the only way to reach a defective notice, and that no means existed for testing the sufficiency of the notice at a preliminary stage.[33] Doubtless the use of motions for uncertainty may become a source of abuse, and in many jurisdictions they are employed with such frequency and for so little reason that they have become a real nuisance. But our Rule provides an effective cure for improper use, in the discretion given the court to impose terms, and if the trial courts refuse to allow this remedy to become an instrument for annoyance and delay it should prove to be a very convenient and useful addition to our practice.

EDSON R. SUNDERLAND.

*The Law School,*
*University of Michigan.*

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[30] Order XIX, Rule 7.
[31] (1893) 84 Wis. 639.
[32] This statement is cited with approval in Stocklen v. Barrett (1911) 58 Ore. 281.
[33] Rosenbury v. Angell (1859) 6 Mich. 508.